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No. 315

In the Supreme Court of the United States

OCTOBER TERM, 1958

I. C. SUTTON HANDLE FACTORY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

JEROME D. FENTON,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

RICHARD H. FRANK,
Attorney,
National Labor Relations Board.
Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court below (Pet. A1-A3) is reported at 255 F. 2d 697. The National Labor Relations Board's findings of fact, conclusions of law, and order (R. 18-42) are reported at 119 NLRB No. 130.

JURISDICTION

The judgment of the court below was entered on July 2, 1958, and petition for rehearing was denied on July 28, 1958. The petition for a writ of certiorari was filed on August 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and

Section 10(f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board, in finding that petitioner discharged an employee in violation of Section 8(a)(3) and (1) of the Act, erred in not accepting the testimony of the employer as determinative of the motive for discharge.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth *infra*, pp. 8-10.

STATEMENT

A. The Board's Findings of Fact

In the spring of 1956, the United Brotherhood of Carpenters and Joiners of America, Local Union 2476, commenced a campaign to organize petitioner's employees (R. 23-24; 12).[1] Employee Joe Hulsey, whose discharge is here involved, became the most active union protagonist (R. 23-24; 7, 12, 13).

Petitioner's hostility to the Union was apparent from the early days of the organizing campaign. In April, Supervisor McCutcheon told employee Yancey that "Mr. Sutton said he was going to fire everyone that had anything to do with the union," and the following month McCutcheon expressed his fears to Yancey that, if the employees joined the Union, peti-

[1] "R." references are to the record filed by petitioner; "S" references are to the Supplemental Record filed by the Board in the court below.

tioner would shut down or move the factory. In June, Foreman Claiborne told employee McElroy that "if they found out who was pushing it [the Union] so hard, they might lay him off," and added, "I think it was Joe Hulsey" (R. 25, 30; 9-10). Harry Sutton, a supervisor and the son of the proprietor, stated that "we suspected Hulsey from the start" (R. 30; 10, S. 13). Prior to this time petitioner had employed Hulsey for three years, regarded him as an able and hard worker, had complimented him on his work, and had never had occasion to criticize him (R. 33; 12, 9, 11, 16).

By October 22, over 20 of petitioner's 37 employees had signed applications for union membership (R. 24; 12, 6). On the morning of October 23, Hulsey, accompanied by employee Onas Chaney, mailed a number of cards to the Union (R. 24; 5, 12). After their arrival at work that day, Hulsey and Chaney told several employees that a majority had signed cards and that the cards had been mailed to the Union (R. 24; 5, 6, 9). By the end of the day this information had circulated "pretty well through the plant" (R. 24; 5, 6, 9, S. 4). The next morning at 11:00 a.m., I. C. Sutton, Sr., saw Hulsey and four other employees in the restroom (R. 31, 34; 15, S. 12). Sutton did not testify that Hulsey had been in the restroom for an unduly long time, or that he was responsible for the presence of the other employees, or that he had been detaining them (R. 34; 15). Sutton, however, promptly inquired of Foreman Claiborne how much time Hulsey "had been losing lately," and Claiborne replied that Hulsey spent a consider-

able amount of time visiting (R. 34; 15).[2] That afternoon petitioner discharged Hulsey (R. 24; 13, 15).

During the next few days Sutton explained to several employees his reason for discharging Hulsey. Sutton told employee Manes (R. 35; 11, S. 10):

> Joe Hulsey was a good guy, good worker, but he got in the toilet and tried to form a union. I had to let him go. I would any other boy.

Similarly, Sutton stated to employee Davis (R. 35; 11, S. 11):

> Joe made a good hand and he worked hard but tried to organize that —— —— union and I had to fire him.

In like vein, Sutton separately advised employees Chaney, McElroy, and Wells that he discharged Hulsey for "organizing the toilet union" (R. 35; 5, 11, 48, S. 3, 7). At few months later, Sutton said to McElroy, "If a man wanted communism he didn't have to go to Russia to get it, just get into the union," and added, "Union or no union . . . Joe Hulsey and Tom Cox wasn't going to come back up there and run [the] business for [Sutton]" (R. 35; 10, S. 8). As a witness, however, Sutton testified that he discharged Hulsey "for visiting and interfering with others' work" (R. 15).

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[2] Although several of petitioner's witnesses testified that during the four to six weeks preceding Hulsey's discharge the supervisors had complained to Sutton concerning Hulsey's wasting time, neither Sutton nor the supervisors ever warned Hulsey or admonished him about his alleged misconduct (R. 33; 16, 15, 17, 48, 47, S. 12).

On October 26, two days after Hulsey's discharge, Sutton summoned five employees to separate interviews in his office in an effort to ascertain why the employees were dissatisfied (R. 25; 15, 4, 6, 9, 10, 11). Sutton asked each of these employees whether he had signed a union card (R. 26; 16). He stated to employee Chaney that if the Union were voted in, the plant would be shut down, told employee McElroy that if the union came in, the plant would not "operate near as much," and observed to employee Davis that factories were moving south to get away from unions (R. 26, 27-28; 4, S. 2-3, 7, 11). On the same day, Foreman Claiborne told Davis that if the Union came in, the plant would run "six months out of the year," and the employees "who voted against the union would get a better deal than the ones who vote with it" (R. 29; 12). During the following months Claiborne repeated to various employees his prediction that advent of the Union would cause the plant to shut down for six months out of the year, and his warning that preference would be shown the anti-union employees (R. 29; 7, 8, 10, 11).

B. The Board's Decision and Order

Rejecting the contention that Hulsey's union activities had nothing to do with his discharge, the Board concluded that petitioner had violated Section 8(a)(3) and (1) of the Act by the discharge of Hulsey, and, further, that it violated Section 8(a)(1) by interrogating and threatening other of its employees with respect to their union activities (R. 19, 28, 37).

The Board accordingly ordered petitioner to cease and desist from violating Section 8(a)(3) and (1)

of the Act, and affirmatively to reinstate Hulsey with back pay, and to post appropriate notices (R. 20-21).

C. The Decision of the Court Below

The court below, following its earlier decisions in *National Labor Relations Board* v. *Minnesota Mining & Manufacturing Co.*, 179 F. 2d 323; *Coca-Cola Bottling Co. of St. Louis* v. *National Labor Relations Board*, 195 F. 2d 955; and *National Labor Relations Board* v. *Cold Spring Granite Co.*, 208 F. 2d 163, and acknowledging like holdings from other circuits (Pet. A3), enforced the order of the Board. More particularly, the court below found that the record contained substantial evidence from which the Board could reasonably infer that petitioner was opposed to unionization of the employees; that petitioner's supervisory personnel had engaged in proscribed activity during the course of the organizing campaign designed to discourage petitioner's employees from becoming members of the union; and that Hulsey had been discharged because of his union activities (Pet. A2). Referring to Sutton's testimony that the discharge was "for visiting and interfering with others' work," the court noted that the "Board, as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted" (Pet. A3).

ARGUMENT

The sole issue presented on this record, whether substantial evidence supports the findings of the Board, is not one warranting review by this Court.

General Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. Petitioner attempts to distill an issue of law from the comment of the court below that the Board was not compelled to accept the testimony of "a highly interested witness, even though it was uncontradicted" (Pet. A3). Aside from the fact that Sutton's testimony as to the reason for the discharge was in fact contradicted (see *supra*, p. 4), the rule of law as stated by the court below is correct, and there is no conflicting authority. See *Quock Ting* v. *United States*, 140 U.S. 417, 420; *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

RICHARD H. FRANK,
Attorney,
National Labor Relations Board.

OCTOBER 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *